No. 83-1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HOLLY JENSEN, Director and WILLIAM J. EDWARDS, Deputy Director, Department of Motor Vehicles, State of Nebraska,

Petitioners,

—v.—

FRANCES J. QUARING,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENT'S BRIEF

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QUESTION PRESENTED

Did Nebraska's refusal to grant Mrs. Quaring's request for a religious exemption to the statutory requirement that a driver's license contain a photograph of the licensee infringe upon Mrs. Quaring's First Amendment right to freely exercise her religious beliefs?

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STATEMENT OF THE CASE

This case concerns the denial by the State of Nebraska and its officials of the Respondent's application for a valid Nebraska motor vehicle operator's license. Respondent, Mrs. Frances J. Quaring, was refused a driver's license because her religious beliefs do not allow her to submit herself to being photographed. (R.22:2-4). Nebraska officials would not voluntarily grant Mrs. Quaring an exemption to the statutory requirement that, with some exceptions, Nebraska drivers must have their photographs affixed to their respective drivers' licenses. (J.A. 9-10). See Neb. Rev. Stat. § 60-406.04 (Cum. Supp. 1982). This litigation then ensued pursuant to 28 U.S.C. § 1343 and 42 U.S.C. § 1983.

Frances J. Quaring is an adult, female resident of the State of Nebraska who lives with her husband and son on their family farm

near Shelton, Nebraska. (R.18:20-23, 19:2-11). In addition to her participation in the farming operation, Mrs. Quaring is also a part-time bookkeeper for a business in nearby Gibbon, Nebraska. (R.21:3-11).

Mrs. Quaring had met every substantive requirement for the issuance of a Nebraska motor vehicle operator's license, but Petitioners refused to issue her a license, because she would not allow her photograph to be taken for use on the license as required by the Nebraska statute. (R.21:21-25). The basis for Mrs. Quaring's objection to being photographed for any purpose is her sincerely held religious belief in a literal interpretation of the Second Commandment. (R.23:4-6, 25:4-23). Mrs. Quaring made numerous attempts, through both legislative and administrative State officials, to obtain an exemption from the photograph requirement, but her request for an exemption was

ultimately denied. (Exhibits 1 and 3, R.24:23-25, 25:1-3).

Mrs. Quaring's belief concerning the Second Commandment results from study of the Bible in which she engaged after a family tragedy. (R.26:22-25, 27:1-5). Because of her exercise of this belief, she has no photographs of her only son (R.27:12-13), no television set (R.27:20-21), and no decorations in her home reflecting nature or floral designs. (R.28:2-5). Further, Mrs. Quaring removes labels from foodstuffs that she purchases for her family if those labels bear pictures of the contents of the package. (R.27:22-25). She possesses no likeness of anything in creation. (R.28:6-9).

Mrs. Quaring testified that she would consider it to be a violation of her religious beliefs if she allowed herself to be photographed. (R.29:1-4). She stated that the circumstances surrounding her driver's

application forced her to choose between her belief in the Second Commandment, on one hand, and the ability to obtain the license, on the other hand. (R.29:9-19).

At the time of the trial, Mrs. Quaring had been driving motor vehicles for 20 years. She had never received a traffic citation or been charged with a law violation of any kind. (R.29:20-25, 30:1). During those 20 years, she had been requested to display her driver's license to a law enforcement officer only once. (R.30:2-9).

Mrs. Quaring's religious beliefs are Christian in nature and are based on the view that the Bible is the word of God and that the Bible contains statements of God's will for her life. (R.30:18-25, 31:1-8). Petitioners now concede that Mrs. Quaring's belief is religious in nature and is sincerely held.

The chief examiner for the driver's license division of the Nebraska Department of Motor Vehicles testified at trial that a driver's licensing program which included a photograph exemption would require no change in the department's examination or application. (R.71:5-10). The department files in the central office in Lincoln, Nebraska, do not contain copies or negatives of the photographs displayed on licenses issued. (R.71:20-23).

The associate director of the driver's services division of the Nebraska Department of Motor Vehicles testified at trial that there currently exist several types of licenses that are exempt from the photograph requirement, including school permits, limited special permits, learner's permits, and temporary permits. (R.77:9-11). He further stated that it was the current practice for requests for any exemptions to

licensing requirements to be reviewed and ruled upon in the central department office -- not by the various county treasurers, who are the agents issuing the licenses. (R.78:19-25, 79:1, 82:9-12). He stated that there had been only one or two requests for photograph exemptions, including Mrs. Quaring's. (R.85:4-9). He also stated that it would be possible to develop an administrative form, or an addendum to the current form, to address requests for photograph exemptions. (R.85:20-25, 86:1-25, 87:1-9). The current driver's license form (Exhibit 101) contains notations for the physical attributes or description of the licensee. (R.88:7-10)

The superintendent of the Nebraska State Patrol testified as to the identification purposes served by the driver's license photograph. (R.98:25, 99:9-12). He also testified that a large number of Nebraska

license holders do not have photographic licenses because of the various exemptions noted above. (R.107:2-14).

The district court found that the Petitioners had established two compelling interests in the photographic driver's license -- identification served the interest of public safety and the interest of security of financial transactions. (Pet.Cert. App.12). However, the district court also found that, with respect to Mrs. Quaring's claim of interference with the free exercise of her religious beliefs, the photographic license is not the least restrictive alternative available to the Petitioners to serve these interests. The district court enjoined the Petitioners from refusing to grant Mrs. Quaring a non-photographic license.

The court of appeals affirmed the judgment rendered by the district court,

although the court of appeals characterized the State of Nebraska's interests in the photographic identification of motorists as "important" rather than compelling. (Pet.Cert.App.27). Both the district court and the court of appeals rejected Petitioners' argument that granting the exemption requested by Mrs. Quaring would contravene the Establishment Clause.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly two thousand years individuals have struggled to give meaning to the Biblical injunction: "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's."[1] All too often, Caesars of one stripe or another have claimed the absolute power to dictate the precise contours of God's portion and to prescribe the only acceptable means for delivering it. The Founders of our nation -- and the waves of immigrants who built it into a world power -- were themselves victims of attempts by kings and parliaments alike to deny individuals the right to decide for themselves what each owed to his or her God and how that debt was to be discharged. The dream of a land where Caesar would respect the religious conscience of the individual

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[1] The New Testament, Matthew 22:21.

drove our forebearers to build a new nation and to inscribe as part of its fundamental law respect for the "free exercise" of religion. The Founders realized that substituting popular sovereignty and majority rule for monarchy and aristocracy would not eliminate the age-old tension between God and Caesar, since a political majority infected by intolerance or beset with insensitivity is not immune from violating religious conscience. Accordingly, each of the original United States, as well as the newly formed nation itself, explicitly provided special protection for religious conscience by forbidding the political majority to interfere with the free exercise of religion. This case, which pits an individual's concededly sincere religious aversion to "graven images," drawn from a literal reading of the Second Commandment, against a decision by Nebraska to require

photographs on almost all driver's licenses, tests the strength and durability of the special constitutional protection for religious conscience.

Nebraska -- and the United States as amicus curiae -- argue that individual religious conscience may be overridden by the majority as long as the majority is seeking, in good faith, to advance a legitimate "programmatic" interest of undefined importance, regardless of the minimal impact that a religious exemption would have on the general effectiveness of the government program at issue.

Respondent believes that the Free Exercise clause protects individual religious conscience against even a good-faith exercise of majority will, unless and until the majority demonstrates that deferring to an individual's religious conscience: (1) would have an unfair impact on third persons; or

(2) would genuinely endanger the government's ability to achieve the goals of the program in question.

ARGUMENT

THE STATE MAY NOT FORCE RESPONDENT TO CHOOSE BETWEEN VIOLATION OF HER RELIGIOUS BELIEFS AND POSSESSION OF A VALID DRIVER'S LICENSE

A. Nebraska's Insistence Upon Photographing Respondent as a Condition for Granting Her a Driver's License Constitutes a Substantial Interference With the Free Exercise of Her Religion, Warranting Strict Judicial Scrutiny Under the Free Exercise Clause.

In any free exercise case, three threshhold issues must be considered: first, the belief in question must qualify as "religious;"[2] second, the government's action must place genuine constraints on the exercise of religious conscience;[3] and,

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[2] Thomas v. Review Board, 450 U.S. 707, 713-16 (1981); United States v. Ballard, 322 U.S. 78 (1944).

[cont'd. on next pg]

third, the government's interest must be sufficiently substantial to warrant the possibility that religious beliefs may be overridden.

This case presents no questions concerning the sincere religious nature of Mrs. Quaring's beliefs[4] or the legitimacy of Nebraska's interest in simplifying the process of identifying drivers of motor vehicles.[5]

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[3] Thomas v. Review Board, 450 U.S. 707, 716-18 (1981); Sherbert v. Verner, 374 U.S. 398, 404 (1963); see Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L. Rev. 1439 (1968).

[4] Mrs. Quaring's religious aversion to being photographed stems from a literal reading of the Second Commandment:

> Thou shalt not make unto thee any graven image or likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth. The Old Testament, Exodus 20:4; see also The Old Testament, Deuteronomy 5:8.

[5] The sufficiency of Nebraska's other asserted interest -- assuring the integrity of private

[cont'd. on next pg]

Nebraska does argue, however, that th refusal to renew Mrs. Quaring's driver's license because of her failure to subm to a photographic practice that violates her religious beliefs does not constitute a sufficient interference with those beliefs to warrant scrutiny as an interference with the free exercise of her religion. Nebraska baldly seeks to resurrect the discredited right-privilege dichotomy, which once authorized the government to condition an individual's receipt of government "privileges" on the waiver of significant constitutional rights.

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financial arrangements by state provision of photographic identification that can be used by merchants and banks -- is more problematic. It is unclear whether the State may legitimately seek to advance the security of private financial arrangements by forcing individuals to act in violation of sincerely held religious beliefs. Not surprisingly, therefore, Nebraska has all but abandoned that justification in its submission to this Court.

Given the extent to which the ability to operate an automobile is a virtual necessity of modern rural life -- both professionally and personally[6] -- and given the close relationship between physical mobility and the constitutionally protected right to travel, it is doubtful whether even the discredited right-privilege dichotomy could have insulated Nebraska's refusal to re-issue Mrs. Quaring's driver's license from searching scrutiny under the Free Exercise clause. More fundamentally, this Court has explicitly rejected the notion that the government may condition receipt of a significant government entitlement on a waiver of religious conscience. As the Court noted in Sherbert v. Verner, 374 U.S. 398, 404 (1963) (footnote

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[6] The record makes clear that Mrs. Quaring's livelihood as both a part-time bookkeeper and a farmer depends on her ability to drive a car.

omitted):

> It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.

In both Sherbert v. Verner and Thomas v. Review Board, 450 U.S. 707 (1981), states sought to justify refusals to pay unemployment compensation to persons whose lack of employment stemmed from the exercise of religious conscience on the ground that government "privileges," such as unemployment compensation and, presumably, driver's licenses, could be withheld from persons whose religion made it impossible for them to comply with otherwise valid eligibility criteria. Claiming that mere denial of benefits did not compel an individual to violate religious conscience, South Carolina and Indiana argued in Sherbert and Thomas that their unemployment compensation programs did not violate the Free Exercise clause. In

both Sherbert and Thomas, however, the Court explicitly rejected the argument that Free Exercise protection applies only against overt State compulsion. The Court recognized that religious freedom is seriously implicated by the coercive effect of a state's attempt to condition the receipt of significant benefits on a waiver of religious conscience. Cf. Pickering v. Board of Education, 391 U.S. 563 (1968) (public employees do not waive free speech rights); FCC v. League of Women Voters, 82 L.Ed.2d. 278 (1984) (applying First Amendment scrutiny to loss of what under prior law would be a mere "privilege"). Accordingly, where, as here, the government "privilege" at issue is of great significance to the individual, Nebraska cannot escape scrutiny under the Free Exercise clause by characterizing its denial of a driver's license as a mere "indirect" interference with Mrs. Quaring's

religious beliefs. Whether characterized as a "direct" or an "indirect" interference, the reality is that Nebraska has forced Mrs. Quaring to choose between her religious conscience and her ability to drive an automobile. Nebraska's power to confront Mrs. Quaring with such an unpleasant choice must be measured not by the conclusory use of labels like "privilege" and "indirect," but by the traditional test of asking whether Nebraska's interest in denying Mrs. Quaring a religious exemption is sufficiently compelling to justify overriding her religious conscience.[7]

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[7] The two state courts to have considered this issue both agreed that conditioning the grant of a driver's license on a waiver of religious conscience warranted scrutiny under the Free Exercise clause to determine whether the State's refusal to grant a religious exemption was justified by a compelling state interest. Colorado upheld the denial; Indiana struck it down as a violation of free exercise. Compare Johnson v. Motor Vehicle Division, 197 Colo. 455, 593 P.2d 1363 (upholding denial of religious exemption), cert. denied, 444 U.S. 885 (1979), with Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. 361, 380 N.E.2d 1225 (1978)
[cont'd. on next pg]

B. Nebraska's Refusal to Permit Mrs. Quaring to Receive a Driver's License Unless She Compromises Her Religious Beliefs Violates the Free Exercise Clause, Because Granting Her a Religious Exemption From Being Photographed Would Neither Adversely Affect Third Persons Nor Seriously Endanger the Goals of the Photograpic Licensing Program.

The existence of the three elements of a free exercise case -- a sincerely held religious belief; a government decision that impinges on that belief; and a plausible government explanation for the decision -- is, of course, merely the starting point for the difficult question of deciding when a legitimate government interest can override a sincerely held religious belief.

Nebraska and the United States as amicus curiae would terminate the analysis before it begins, by arguing that the existence of a legitimate governmental programmatic interest

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(requiring religious exemption).

justifies overriding individual religious conscience in virtually every case, without considering the actual or likely costs to the program of exempting individuals on religious grounds. Such an approach would reduce the protection of the Free Exercise clause to an admonition against irrational or unreasonable legislation. However, if there is one clear message which the Founders wished the Free Exercise clause to send, it was a message that the majority may not infringe on religious conscience, even when the majority believes it reasonable to do so. One hardly needs an explicit Free Exercise clause to guarantee religious conscience solely against irrational or unreasonable majority action.

On the other hand, an ordered society cannot tolerate the unlimited exercise of individual religious conscience without risking society's very existence. Accordingly, it is clear that situations

exist which would justify Nebraska in refusing to defer to a claim for a religious exemption from an otherwise valid obligation of citizenship.

Not surprisingly, therefore, the Court has rejected the extremes of "always" and "never" and has permitted the government to override a sincerely held religious belief only when the state has demonstrated that granting of a religious exemption would either adversely affect third persons or threaten the integrity of the program at issue.

The Court has upheld Free Exercise claims at least seven times in the years since the First Amendment has been applicable to the States.[8] Pierce v. Society of Sisters, 268 U.S. 510 (1925); Cantwell v.

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[8] Prior to the enactment of the Fourteenth Amendment, the Free Exercise Clause was held inapplicable to the States. Permoli v. New Orleans, 47 U.S. (3 How.) 589 (1845).

Connecticut, 310 U.S. 296 (1940); Murdock v. Pennsylvania, 319 U.S. 105 (1943); West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943); Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972); Thomas v. Review Board, 450 U.S. 707 (1981). Free Exercise claims have been rejected in eight principal cases. Reynolds v. United States 98 U.S. 145 (1878);[9] Jacobson v. Massachusetts, 197 U.S. 11 (1905);[10] Hamilton v. Regents of the University of California, 293 U.S. 245 (1934); Prince v. Massachusetts, 321 U.S. 158 (1944); Braunfeld v. Brown, 366 U.S. 599 (1961); Gillette v. United States, 401 U.S. 437 (1971); United States v. Lee, 455 U.S. 252 (1982); Bob Jones University v. United

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[9] See also Davis v. Beason, 133 U.S. 333 (1890); Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1 (1890).

[10] See also Zucht v. King, 260 U.S. 174 (1922).

States, 76 L.Ed.2d 157 (1983).[11] When one compares the fifteen cases, the principles governing the disposition of this case come sharply into focus.

The Court's recognition of free exercise claims has taken place in contexts where deference to religious conscience did not impose unfair disadvantages on third parties and did not endanger the success of the government program at issue.

The Court's rejection of free exercise claims has taken place in contexts where deference to religious conscience would adversely affect third parties and would pose a credible danger to attaining the goals of the program at issue.

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[11] Heffron v. ISKCON, 452 U.S. 640 (1981), and Widmar v. Vincent, 454 U.S. 263 (1981), involved claims of free exercise of religion as well. The Court, however, analyzed the cases solely in free speech terms.

Thus, in Pierce v. Society of Sisters, 268 U.S. 510 (1925), Oregon asserted a governmental interest in establishing a uniform system of compulsory public education and sought to prohibit parents from sending their children to private religious schools. This Court upheld the constitutional claims of parents wishing to send their children to parochial schools, noting that

> [t]he fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only.

268 U.S. at 535.[12] In Pierce, the significant state interest in an adequate education was obvious. The mere existence of

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[12] Strictly speaking, Pierce did not involve free exercise claims, since the Court had not yet held the First Amendment applicable to the States. However, the Court's due process "liberty" analysis tracked what a modern court would call free exercise rights.

such a valid "programmatic" interest did not end the analysis, however, since the state's legitimate interest in adequate education was not threatened by permitting certain parents to send their children to qualified parochial schools.

Similarly, in Cantwell v. Connecticut, 310 U.S. 296 (1940), the Court ruled that the Free Exercise clause protected Cantwell's religious prosyletizing despite a legitimate governmental interest in regulating charitable solicitation and in preserving the public peace. As in Pierce, the mere existence of a legitimate government interest did not justify the restrictions in Cantwell, because the government's interest was capable of advancement by means that did not infringe on Cantwell's religious freedom.[13]

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[13] Cantwell appears to be the first instance in which the Court explicitly rested a decision invalidating a state regulation on free exercise [cont'd. on next pg]

In Murdock v. Pennsylvania, 319 U.S. 105 (1943), the Court invalidated a licensing fee imposed by a municipality on Jehovah's Witnesses engaged in door-to-door propagation of their faith, ruling that the fee violated the Free Exercise clause.

In West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), the Court, reversing Minersville School District v. Gobitis, 310 U.S. 586 (1940), ruled that West Virginia could not suspend a Jehovah's Witness from public school for refusing to pledge allegiance to the American flag. In Barnette, no one questioned the legitimacy of using the flag salute to inculcate patriotism in school children. Despite the legitimacy of the government interest, however, and the

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grounds. In Cantwell, the Court abandoned the rigid belief-action distinction that had characterized some of the Court's earlier free exercise decisions. See, e.g., Reynolds v. United States, 98 U.S. 145, 166 (1878).

plain fact that it could not be fully advanced if some children could refuse to salute the flag, the Court declined to permit West Virginia to override religious conscience, since, as in Pierce, the state's general educational objective of inculcating patriotism was not threatened by the grant of individual religious exemptions from compulsory flag salutes.

In Sherbert v. Verner, 374 U.S. 398 (1963), a Seventh Day Adventist refused to work on her Sabbath and was forced to resign from a job that required Saturday work. The Court ruled that South Carolina's refusal to permit her to qualify for unemployment compensation violated the Free Exercise clause. South Carolina's legitimate interest in protecting the financial integrity of the unemployment compensation fund and in preventing fraudulent claims was, of course, undisputed. But, as in Pierce and Barnette,

the State was unable to demonstrate that deferring to an individual's religious conscience would pose a serious threat to the advancement of South Carolina's legitimate interests.

In Wisconsin v. Yoder, 406 U.S. 205 (1972), Amish parents refused to send their children to school beyond the eighth grade and were threatened with sanctions for violating Wisconsin's compulsory attendance laws. This Court ruled that the Free Exercise clause required Wisconsin to exempt the Amish because the legitimate state interests served by compulsory attendance laws were not materially threatened by deferring to the sincerely held religious beliefs of Amish parents. Yoder stands, therefore, as an extraordinary reminder that the existence of a valid programmatic interest is merely the beginning of the Free Exercise inquiry, for, if the State's general

programmatic interest is not unduly threatened by deferring to individual claims of religious conscience, the State must respect the claim.[14]

Finally, in Thomas v. Review Board, 450 U.S. 707 (1981), a Jehovah's Witness steel-

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[14] Inexplicably, the brief amicus curiae submitted on behalf of the United States does not cite or discuss Yoder. It is, of course, impossible to square Yoder's insistence upon close scrutiny of whether the State's interests are, in fact, threatened by individual religious exemptions with the Solicitor General's attempt to reduce free exercise protection to an inquiry into the importance of the government's programmatic interest. It is precisely the task of the Free Exercise clause as interpreted in Yoder to force the State to explain why a grant of religious exemption in individual cases would threaten the attainment of the program's general goals. In considering the probable impact of a religious exemption, the government and courts need not blind themselves to the number of persons likely to claim an exemption; to the extent that the Solicitor General makes this point, he is not incorrect. But there is no occasion for loose speculation about possible abuse of the religious exemption. See Sherbert v. Verner, 374 U.S. at 406-08. The focus is properly on whether a particular exemption is likely, given its nature, to lead to third-party costs or to widespread abuse. See United States v. Lee, 455 U.S. at 260-61; see generally Freed and Polsby, Race, Religion, and Public Policy: Bob Jones University v. United States, 1983 Sup. Ct. Rev. 1, 20-30.

worker resigned when he was transferred from a foundry to a department producing turrets for military tanks. This Court ruled that Indiana's refusal to permit him to qualify for unemployment compensation violated the Free Exercise clause. As in Sherbert v. Verner and Wisconsin v. Yoder, the legitimacy of the state's interest in maintaining a solvent fund and in deterring fraud was undisputed. However, as the Chief Justice noted, "[w]hen the focus of the inquiry [was] properly narrowed," Indiana was unable to demonstrate anything except wholly speculative threats to its legitimate interests. 450 U.S. at 719.

When one applies the principles derived from Pierce, Cantwell, Murdock, Barnette, Sherbert, Yoder and Thomas to Nebraska's refusal to recognize Mrs. Quaring's claim of religious conscience, the parallels are readily apparent. Nebraska's legitimate

interest in securing more efficient identification of the driving public is hardly threatened by exempting a few religious individuals from the photographic requirement. There is surely no incentive to concoct false religious claims here, as there might be in cases seeking exemption from taxes of general applicability. Cf. United States v. Lee, 455 U.S. at 263 n.3 (Stevens, J., concurring). The vast bulk of drivers will continue to be photographed and even the few religious exemptees will carry written descriptions of identity that provide an adequate alternative means of identification -- an effective means used by New York as recently as 1984 and by most states for decades.[15] Nebraska has itself exempted

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[15] The Solicitor General argues that it is inappropriate to consider whether large numbers of persons are likely to claim an exemption because the grant or denial of a free exercise claim should not turn on the number of adherents. However, it is the essence of free exercise inquiry to determine what the actual cost to the State of granting a religious [cont'd. on next pg]

learners' permits, farm machinery licenses and several other categories of drivers' licenses from the photographic requirement, rendering it even less likely that a religious exemption would materially interfere with the attainment of the program's general goals. Indeed, the threat to Nebraska's legitimate interests which would be posed by granting Mrs. Quaring a religious exemption is far less significant than the asserted threats in Sherbert, Yoder

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exemption is likely to be and to determine whether that actual cost threatens the attainment of the State's goals. Closing one's eyes to the number of potential applicants for an exemption makes it impossible to engage in the required analysis. E.g., Thomas v. Review Board, 450 U.S. at 719. Nor is it strange that widespread or mainstream religious beliefs will be less likely to prevail under such an analysis. Mainstream faiths have shown themselves more than capable of defending their interests in the political process. It is precisely because faiths with relatively few adherents are notoriously unable to defend themselves in the legislative arena that the Free Exercise clause was initially adopted. Cf. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); J. Ely, Democracy and Distrust 100 (1980).

and Thomas, none of which justified overriding religious conscience.

On the other hand, in rejecting free exercise challenges to anti-polygamy laws,[16] compulsory vaccination statutes,[17] child labor laws,[18] compulsory military training and service,[19] Sunday closing laws,[20] and tax status,[21] the Court has stressed that

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[16] Reynolds v. United States, 98 U.S. 145 (1878); see also Davis v. Beason, 133 U.S. 333 (1890); Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1 (1890).

[17] Jacobson v. Massachusetts, 197 U.S. 11 (1905); see also Zucht v. King, 260 U.S. 174 (1922).

[18] Prince v. Massachusetts, 321 U.S. 158 (1944).

[19] Gillette v. United States, 401 U.S. 437 (1971); see also Hamilton v. Regents of the University of California, 293 U.S. 245 (1934).

[20] Braunfeld v. Brown, 366 U.S. 599 (1961). Braunfeld is couched in right-privilege terms, rendering its current vitality as a precedent highly questionable. Even if Braunfeld remains good law, however, it is clearly distinguishable from this case since, unlike Braunfeld, granting a religious exemption to Mrs. Quaring would not adversely affect third persons and would not endanger the goals of the government program in question.

[21] Bob Jones University v. United States, 76 L.Ed.2d [cont'd. on next pg]

granting the requested exemptions would have both adversely affected third persons and would have posed a serious threat to the government programs at issue.

United States v. Lee, 455 U.S. 252 (1982), is illustrative of these cases. There, the Court rejected a claim by Amish employers to a religious exemption from the payment of Social Security taxes. As in Reynolds, Jacobson and Prince, exempting Amish employers in Lee would have adversely affected several categories of third persons, including employees whose Social Security coverage would have been affected and competitors who would have been placed at an economic disadvantage. Finally, granting religious exemptions from the payment of Social Security taxes was deemed by the Court to threaten the principle of universality on

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157 (1983); United States v. Lee, 455 U.S. 252 (1982).

which the Social Security system rests. 455 U.S. at 260. Moreover, there was a substantial likelihood in Lee's tax context, as there is not here, that individuals might falsify religious claims, leading to severe (and entangling) administrative problems. See id. at 263 n.3 (Stevens, J., concurring.) Thus, Lee provides no support for Nebraska's refusal to recognize Mrs. Quaring's request for a religious exemption. In fact, as the Court noted in Lee, when no third persons were adversely affected Congress granted a religious exemption from Social Security taxes to self-employed Amish. 455 U.S. at 260-61; see 26 U.S.C. § 1402(g).

The principle that emerges from the Court's free exercise cases is a clear one: An individual is entitled to a claim of religious exemption from an otherwise valid obligation of citizenship unless the State

can demonstrate that third persons would be seriously disadvantaged or that the exemption threatens the attainment of the general goals of the program in question.[22] Tested by such a principle, Nebraska's insistence on forcing Mrs. Quaring to choose between her religious conscience and her ability to drive an automobile violates the Free Exercise clause.

C. The Courts Below Correctly Found That the State's Interest in Assuring the Identification of Mrs. Quaring Could Be Served By Means that Would Not Violate Her Religious Belief.

Respondent has demonstrated that the grant of a religious exemption to Mrs. Quaring and to others likely to request such

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[22] The same principle has been applied in First Amendment speech cases: an individual is entitled to an exemption from an otherwise valid obligation of citizenship where the obligation burdens the exercise of important speech interests, unless the exemption would threaten attainment of the general goals of the program. See, e.g., NAACP v. Alabama, 357 U.S. 449 (1958); Brown v. Socialist Workers '74 Campaign Commititee, 459 U.S. 87 (1982).

an exemption would not adversely affect third persons or endanger the general goals of Nebraska's photographic licensing program. Nor would it seriously interfere with Nebraska's interest in assuring that Mrs. Quaring remains readily identifiable while driving a car. Respondent does not believe that Nebraska's interest in maximizing identifiability is a "compelling" one. See Quaring v. Peterson, 728 F.2d 1121, 1126-27 (8th Cir. 1984) (Pet. App. 27-29); Bureau of Motor Vehicles v. Pentecostal House of Prayer, 269 Ind. 361, 380 N.E.2d 125 (1978). But even if the state's interest were compelling, religious exemptees can be identified by means that do not violate religious conscience. When, as here, free exercise of religion is at issue, the Constitution requires an inquiry into whether the means employed to serve the government's interests represent the least restrictive

alternative for achieving the desired end. Thomas v. Review Board, 450 U.S. at 718.

First, it is clear that no administrative hurdle prevents religious dissenters from identifying themselves by means other than a photograph.

The record reflects that the administrative machinery already is in place for the procedures required to accommodate Mrs. Quaring's religious belief. There simply would be no significant administrative burden created by the district court's decision requiring such accommodation. At most, the Department of Motor Vehicles may have to devise a form for persons desiring a photograph exemption. The state central licensing office is already in daily contact with licensing stations, and procedural directives are issued from the central office to county treasurers on a regular basis. Following the entry of the district court's

judgment, the Department of Motor Vehicles arranged for Buffalo County, Nebraska, officials to issue a non-photographic license to Mrs. Quaring. Only administrative inconvenience that renders an entire statutory scheme unworkable will be sufficient to prevent the implementation of a less restrictive alternative when such an alternative will not threaten the state interests underlying the statute. Sherbert v. Verner, 374 U.S. at 409.

The Minnesota Supreme Court addressed an analogous situation in In re Jenison, 265 Minn. 96, 120 N.W.2d 515, vacated and remanded, 375 U.S. 14, on remand, 267 Minn. 136, 125 N.W.2d 588 (1963). Jenison involved a claim for a religiously based exemption from jury duty. In its first opinion, the Minnesota court held that such an exemption would present administrative difficulties of the same sort asserted by the Petitioners in

the instant case. This Court vacated that decision and remanded the case for further consideration in light of Sherbert, supra. On remand, the Minnesota court, properly following the analysis articulated in Sherbert, held that the State had not adequately shown that the requested exemption would result in an inability to obtain competent jurors. The court said:

> Consequently we hold that until and unless further experience indicates that the indiscriminate invoking of the First Amendment poses a serious threat to the effective functioning of our jury system, any person whose religious convictions prohibit compulsory jury duty shall hence forth be exempt.

Jenison, supra, 125 N.W.2d at 589. It is equally clear from the record in the instant case -- as the court of appeals correctly decided -- that the exemption sought by Mrs. Quaring will not create an administrative burden which will render Nebraska's drivers' licensing program unworkable.

Second, the use of written descriptions of the physical characteristics of religious exemptees such as Mrs. Quaring would scarcely inconvenience the Motor Vehicle Department and would permit effective identification of a driver. While a written description of physical characteristics is not completely equivalent to a photograph, it is an adequate substitute for those few individuals whose religious consciences preclude their being photographed. In fact, the use of a written description of physical characteristics is at least as acceptable an alternative as was the vocational training in Yoder that was deemed a sufficient substitute for high school education. Wisconsin v. Yoder, 406 U.S. at 225-27.

With regard to the other state interest found by the lower courts, there has been no showing whatsoever that Mrs. Quaring represents any threat to the security of

financial transactions. If anyone is inconvenienced or handicapped by the accommodation granted below, it is the person issued a non-photographic license. Merchants are free to demand whatever identification they deem appropriate and sufficient when their customers seek to cash checks. If merchants demand photographic identification, it is the person without the photograph who is disadvantaged -- not the merchant, and certainly not the State.

D. No Violation Of The Establishment Clause Occurs If Nebraska Officials Are Required To Grant Mrs. Quaring An Exemption From The Photograph Requirement Or If Those Officials Are Required To Establish Criteria On Which To Base Grants Or Denials Of Exemptions To The Photograph Requirement.

Granting Mrs. Quaring an exemption involves neither participation by the government in her belief nor a governmental endorsement of the belief. By granting Mrs.

Quaring a non-photographic driver's license, the government merely recognizes the validity of her assertion that her personal attempts to live a life consistent with her beliefs are shielded from governmental interference -- direct or indirect -- by the Free Exercise clause.

Nebraska insists upon arguing that recognition of Mrs. Quaring's claim to religious conscience would violate the Establishment Clause. Wholly apart from the incongruity of such an argument by a State that insists on maintaining a paid State Chaplain, see Marsh v. Chambers, 77 L.Ed.2d 1019 (1983), this Court has repeatedly rejected claims that state accommodation of Free Exercise claims violates the Establishment Clause. See, e.g., Thomas v. Review Board, 450 U.S. at 719-20; Wisconsin v. Yoder, 406 U.S. at 220-21; Sherbert v. Verner, 374 U.S. at 409. An argument similar

to the one advanced here by the Petitioners was presented to the Court in Yoder, supra. In agreeing with the Court's rejection of the view that accommodating the religious practice at issue in Yoder would constitute an establishment of religion, Justice White wrote:

> Decision in cases such as this and the administration of an exemption for Old Order Amish from the State's compulsory school-attendance laws will inevitably involve the kind of close and perhaps repeated scrutiny of religious practices, as is exemplified in today's opinion, which the Court has heretofore been anxious to avoid. But such entanglement does not create a forbidden establishment of religion where it is essential to implement free exercise values threatened by an otherwise neutral program instituted to foster some permissible, nonreligious state objective.

Wisconsin v. Yoder, 406 U.S. at 240-41 (White, J., concurring).

CONCLUSION

For all of the foregoing reasons the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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December 15, 1984

* Counsel gratefully acknowledge the assistance of Carl H. Loewenson, Jr., a law school graduate who is awaiting admission to the New York Bar, in the research and preparation of this brief.